IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAYMOND, NAPOLI DIAMOND, P.C., ANDREW NAPOLI, SCOTT DIAMOND, JACK BERNSTEIN, DAVID BERMAN	:	**CIVIL ACTION**
v.	:	
JOHN HAYMOND and THE HAYMOND LAW FIRM, P.C.	:	**No. 02-721**

Norma L. Shapiro, S.J. **September 08, 2004**

MEMORANDUM AND ORDER

Plaintiffs/Counterclaim Defendants, Haymond Napoli Diamond, P.C., d/b/a Hochberg Napoli Diamond ("HND-PA"), Andrew F. Napoli ("Napoli"), Scott E. Diamond ("Diamond"), Jack Bernstein ("Bernstein"), David S. Berman ("Berman") and Robert Hochberg[1] ("Hochberg"), (together, "the HND-PA parties"), filed 53 post-trial motions under Fed. R. Civ. P. 50 and 59, following a three-week trial and jury verdict in favor of defendants/counterclaim plaintiffs, John Haymond ("Haymond") and the Haymond Law Firm (together, "the Haymond parties").

[1]Hochberg is a Counterclaim Defendant only. HND-PA v. Haymond, No. 02-721, (E.D. Pa. July 14, 2003) (Order dismissing Hochberg as plaintiff).

I. Factual Background[2]

This breach of contract action with related counterclaims arises in part from prior litigation involving the dissolution of Haymond & Lundy, LLP ("H&L"), a personal injury law firm. That action's procedural history may be found in this court's eleven opinions and two opinions of the Court of Appeals. See Haymond v. Lundy, No. 99-5048, 2000 U.S. Dist. LEXIS 8585 (E.D. Pa. 2000) (denying in part Haymond and Lundy's cross-motions to dismiss); Haymond v. Lundy, No. 99-5048, 2000 U.S. Dist. LEXIS 17879 (E.D. Pa. 2000) (dismissing in part Lundy's claims against Hochberg for the unauthorized practice of law); Haymond v. Lundy, No. 99-5048, 2001 U.S. Dist. LEXIS 54 (E.D. Pa. 2001) (granting and denying in part cross-motions for summary judgment); Haymond v. Lundy, No.

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[2]In deciding whether a rule 50(b) motion should be granted, a district court must view the record as a whole, drawing all reasonable inferences in favor of the nonmoving party. Reeves v. Sanderson Plumbing Products 530 U.S. 133, 150 (1995); In considering whether to grant a new trial pursuant to Fed. R. Civ. P. 59(a), the court need not view the evidence in the light most favorable to the verdict winner, Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980), but the court must not substitute its own judgment of the facts and the credibility of the witnesses for those of the jury. Where the asserted ground for a new trial is that the verdict is against the weight of the evidence, the district court's discretion is narrow, and a new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." Williamson v. Consol. Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991).

99-5048, 2001 U.S. Dist. LEXIS 630 (E.D. Pa. 2001) (granting the HND-PA parties' motion for summary judgment against Lundy on the civil conspiracy counterclaim); Haymond v. Lundy, 177 F. Supp. 2d 371 (E.D. Pa. 2001) (following jury verdict for Haymond, entering judgment in favor of Haymond, appointing Receiver to dissolve partnership, and creating a schedule for distribution of partnership assets), aff'd in relevant part, 79 Fed. Appx. 503 (3d Cir. 2003); Haymond v. Lundy, 174 F. Supp. 2d 269 (E.D. Pa. 2001) (following bench trial, entering judgment for Lundy on Lundy's claim that Hochberg engaged in unauthorized practice of law), vacated, 91 Fed. Appx. 739 (3d Cir. 2003) (for lack of jurisdiction); Haymond v. Lundy, 205 F. Supp. 2d 390 (E.D. Pa. 2002) (denying cross-motions for post-trial relief, denying motion to intervene), aff'd in relevant part 79 Fed. Appx. 503 (3d Cir. 2003); Haymond v. Lundy, 205 F. Supp. 2d 403 (E. D. Pa. 2002) (granting Lundy's petition for attorney's fees); Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15770 (E.D. Pa. 2002) (adopting proposed distribution of assets); Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767 (E.D. Pa. 2002) (denying Lundy's Motion to Effectuate Jurisdiction) aff'd 79 Fed. Appx. 503, 2003 U.S. Dist. LEXIS 13487 (3d Cir. 2003).

A. History of the Haymond and Lundy Litigation: Civil Action No. 99-5048

Formation & Dissolution of H&L

H&L was formed on October 13, 1997; initially, the partners were Marvin Lundy ("Lundy"), Haymond and Hochberg. The firm's other attorneys included Napoli, Diamond, Berman, Bernstein, Barry Magen, Robert Pollan, Fred Braverman and George Szymanski. See, Stip. Facts.[3] Lundy, who had practiced law in the Philadelphia area, contributed his pending cases to the firm, and Haymond and Hochberg, who had been partners in a Connecticut law firm, contributed cash for expenses. The partnership continued until October 8, 1999, when Lundy dissolved it by letter to Haymond and Hochberg. Stip. Facts. Haymond and Lundy each immediately filed civil actions in the United States District Court for the Eastern District of Pennsylvania.

As part of these proceedings, on November 10, 1999, the court appointed Martin Heller, Esq. ("Receiver" or "Heller"), as H&L's "Neutral Court Representative with the powers and duties of a master under Fed. R. Civ. P. 53." Haymond v. Lundy, No. 99-5048, (E.D. Pa. Nov. 10, 1999)(Paper #18)(Order appointing

[3]In the instant action, the parties agreed to a number of stipulated facts which were read on the record before the jury. The stipulated facts are included in Plaintiff's Second Supplemental Final Pre-Trial Memorandum (Paper #186) and Defendants' Revised and Restated Pre-Trial Memorandum (Paper #187).

Receiver). Heller was empowered to: (1) meet with the parties to implement an orderly and equitable division of the cases of the Former Clients between the parties and their respective law firms, subject to the Former Clients' written instructions and approval of the court"; and (2) to use bank accounts in his representative capacity to hold sums in escrow for payment of bills and eventual distribution of profits, if any, to the parties. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767, at *3-*4. All of Heller's activities were subject to review and supervision by the court. Id., at *4. Every attorney formerly employed by H&L received notice of this appointment. Id.

On December 10, 1999, Alan Epstein, Esq., counsel to Lundy, wrote to Larry Spector, Esq., counsel to Haymond, to memorialize the parties' agreement escrowing attorney's fees collected by the former partners:

> Fees from cases opened after the inception of H&L (October 1997) and before its dissolution would be held in escrow in the "Haymond and Lundy operating account" after certain distributions were made.
>
> Fees from cases opened by Lundy (the "Lundy" or "ML&L" cases) would be held in escrow by Lundy and deposited in an account at Prudential Securities.

Id., at *4-*5. Heller, writing on the text of this letter on December 12, 1999, and attaching a new signature page, wrote:

> The Lundy cases "shall be held by Mr. Lundy in that account pending agreement or a court order as to the disbursement of those funds."
>
> "From Martin Heller to all attorneys + non-attorneys

> of the Law Office of Marvin Lundy and Haymond, Napoli and Diamond. This letter should be considered as if it were an Order of the Court. Any deviation from this Order will be reported to the Court and appropriate sanction will be recommended."

Id., at *5. The court was notified of this Order and approved of it, but the Order was not entered on the docket; no one subject to the Order objected to it. Id. All of the HND-PA parties were aware of the letter agreement to escrow fees. Stip. Facts.

On August 31, 2001, after a jury verdict against Lundy on all claims and counterclaims, judgment was entered on Haymond's claims for breach of the partnership agreement. Haymond v. Lundy, 177 F. Supp. 2d at 389. Under the judgment, Haymond was to receive forty percent of fees from cases generated during the existence of H&L while Lundy was to receive sixty percent with some exceptions. Stip. Facts. As to cases Lundy brought into the initial partnership that were litigated after the dissolution by Haymond's new firm, Haymond was to receive eighty percent and Lundy only twenty percent, again with certain exceptions. Id. Haymond and Lundy were both obligated to place in escrow net fees already earned and those received from future Haymond and Lundy cases. Id., at 390.[4]

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[4]The judgment order stated in part:

(ii) Net fees accumulated during the pendency of this action and held in escrow by the parties in accordance with this court's orders may be distributed as soon as the amounts held in escrow are verified correct by the Receiver.

(iii) Additional net fees received from H&L cases by the parties

At the Receiver's request, the court appointed Jerome Kellner ("Kellner"), a certified public accountant, to help effectuate its judgment. Haymond v. Lundy, No. 99-5048 (Paper #307)(Order). The fees and costs collected but not placed in escrow totaled $1,532,948 as of January 31, 2002, according to Jerome A. Kellner (the "Kellner Report"). See, Pl. Exh. 25. HND-PA has not remitted those funds to HND-CT or Haymond.

Involvement of the HND-PA parties in H&L litigation

On September 7, 2001, HND-PA, Napoli, Diamond, Bernstein, Berman and Hochberg, jointly moved to intervene in the litigation between Haymond and Lundy, Haymond v. Lundy, No. 99-5048 (Paper #303), but Haymond and Lundy both objected. On October 25, 2001, HND-PA withdrew its motion to intervene. Haymond v. Lundy, No. 99-5048 (Paper #324). The HND-PA parties subsequently filed the instant action in the Philadelphia Court of Common Pleas; it was removed to this court on the ground of diversity on February 12, 2002. HND-PA v. Haymond, No. 02-721, Notice of Removal (Paper #1).

On January 15, 2002, Lundy moved to effectuate jurisdiction over HND-PA in Civil Action No. 99-5048, because the law firm controlled the assets subject to the Haymond and Lundy

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shall be placed in escrow pending an approval of the amount and distribution by the Receiver.

Haymond v. Lundy, 177 F. Supp. 2d at 390.

litigation. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767 (E.D. Pa. 2002). The motion was denied because the court, in distributing the H&L assets, treated Haymond as in privity with HND-PA to evade the court's jurisdiction, to avoid penalizing Lundy by delaying the distribution. Id., at *29. Haymond was charged with $1,532,948, as though he had received and retained that amount, even though he had not, and left the respective shares of Haymond and HND-PA for another day. Id., at *30. The court viewed the amount due Lundy as distinct from Haymond's recovery against HND-PA.

As a result, although Haymond and Lundy were each due a distribution of $1,675,402, the court subtracted from Haymond's distribution the $1,532,948 in accounts receivable diverted from escrow by HND-PA, resulting in a $142,454 judgment for Haymond. Id.

B. History of the Instant Action: Civil Action No. 02-721

Creation of HND-CT

On October 14, 1999, following the dissolution of H&L on October 8, Haymond held a meeting with various former H&L attorneys, including Diamond, Bernstein and Berman, to solicit the attorneys not to accept employment with Lundy's new firm but to join his new law firm. Stip. Facts. Haymond promised Diamond that if he came to work for the new firm, he would continue to receive the same $150,000 salary and benefits as he had at H&L.

HND-PA v. Haymond, No. 02-721, Second set of interrogatories (Paper #221). Haymond made similar offers to Napoli, Berman and Bernstein. Haymond also suggested that the Haymond law firm would cover all expenses, salaries and employee benefits and that Scott Diamond would be paid a $150,000 salary plus benefits. Id. Napoli, Diamond, Berman, Bernstein and Hochberg joined Haymond in a new law firm, Haymond Napoli Diamond, P.C., the Connecticut law firm now known as the Haymond Law Firm, P.C. ("HND-CT"). Id. Hochberg and Haymond were the only shareholders in HND-CT. Id.

In April 2000, Haymond stopped paying Napoli, Diamond, Bernstein and Berman, three weeks later gave them a lump sum check for the previous three weeks, and then stopped paying altogether in May. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Mar. 23, 2004) (Paper #177) (Order denying motions for summary judgment).

Creation of HND-PA: June 29, 2000 Agreement

On June 29, 2000, Haymond, Napoli, Diamond and Hochberg entered into an agreement creating a separate law firm, HND-PA, for the Pennsylvania operations of HND. See, Pl. Exh. 5, June 29, 2000 Agreement. The Agreement divested Haymond of daily responsibility for managing the Pennsylvania practice. Id., at ¶6. HND-CT advanced funds to the HND-PA parties to form HND-PA.[5]

[5]The parties disagreed on the amount of money HND-CT advanced to HND-PA. At trial, the parties stipulated the amount was $1,350,655.

HND-CT advanced an additional $100,000 to HND-PA after it was formed. Stip. Facts. In July 2000, Napoli, Diamond, Bernstein and Berman began receiving wages from HND-PA. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Mar. 23, 2004) (Paper #177) (Order denying motions for summary judgment).

The Agreement, signed by Hochberg, Haymond, Napoli and Diamond, provided, in relevant part:

> All property including but not limited to furniture, fixtures, software, supplies, bank account and cases in progress owned by HND-CT and located or primarily utilized in Pennsylvania or New Jersey are hereby conveyed and assigned to HND-PA. Excluded from this conveyance/assignment are funds totaling $1,050,000 which may be received in connection with a lawsuit against Marvin Lundy, et al. Currently pending in (court & docket #). [sic] These funds shall remain the property of HND-CT but any monies received in excess of $1,050,000 shall become the property of HND-PA. Pl. Exh. 5 at ¶1.
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> [HND-PA] shall assume all obligations and liabilities of [HND-CT] in connection with the maintenance and operation of the law firm on [sic] Pennsylvania and New Jersey including but not limited to lease obligations, yellow page advertising[,] equipment and service contracts, payroll and any and all other existing and future obligations. Id. at ¶6
>
> [T]he lawsuit against Marvin Lundy may be settled by John Haymond but only with the approval of at least three of the following individuals: Scott Diamond, Andrew Napoli, Jack Bernstein, David Berman, or Robert Hochberg. Id. at ¶ 9.
>
> It is further agreed that all strategy regarding the lawsuit will be discussed in advance by all the parties to this agreement. Id.

The Agreement also appointed Robert Hochberg firm manager. Id., at ¶12.

Escrow of Fees

While employed by HND-CT, Napoli, Diamond, Bernstein, Berman and Hochberg escrowed fees from H&L cases. Stip. Fact. After the formation of HND-PA, the firm established its own escrow accounts into which the HND-PA parties placed fees from H&L cases for a period of time. Id. The HND-PA parties eventually stopped escrowing fees from H&L cases to finance the daily operation of their law firm. Id. Since January 30, 2002, when the Kellner report was released, HND-PA has continued to receive, retain and spend fees earned from H&L cases not accounted for in the report. Id. Haymond did not know until January 30, 2002 that HND-PA ceased escrowing fees.

Haymond - Hochberg Release

In 1996, Hochberg had been indicted and in 1997 pled guilty to conspiracy to commit bank fraud; as a result he lost his Massachusetts law license, and was suspended from practice in Connecticut for three years. Tr. 5/10/04, at 18/20 - 20/17. When he initially came to work for Haymond and Lundy, Hochberg concealed the fact that he had been indicted from Haymond and Lundy, but after he was convicted, Haymond wrote letters to the presiding judge on his behalf to urge a lenient sentence. Tr. 5/7/04 at 21/20-25/10. One of the issues in Civil Action No. 99-5048 was Lundy's allegation that Hochberg, Diamond and Haymond had defrauded him by not disclosing Hochberg's indictment at the

time the H&L partnership agreement was negotiated;[6] those claims are part of a lawsuit pending in the Philadelphia Court of Common Pleas. Tr. 5/7/04 at 25/5-13.

The relationship between Haymond and Hochberg became strained and Hochberg began to shut Haymond out of decision-making in the operation of HND-CT, and decreased Haymond's compensation but gave himself a bonus. Tr. 5/7/04 at 25/19-28/6. As a result, Haymond terminated Hochberg as manager of HND-CT on February 26, 2001. Tr. 5/7/04 at 28/6.

On April 6, 2001, Haymond and Hochberg entered a Severance and Settlement Agreement to settle any known and unknown claims between them. See, Pl. Exh. 20, Severance and Settlement Agreement (Apr. 6, 2001). HND and Haymond released Hochberg:

> and his current and former agents, employees, officers, directors, attorneys, assigns, predecessors, successors, and affiliated persons and organizations from all liabilities, causes of action, charges, complaints, claims, obligations, costs, losses, damages, injuries, interest, attorneys' fees, liquidated damages, punitive damages, penalties, fines, all damages and claims of any kind, including those related to attorneys' fees, both known and unknown, which HND and Haymond may have had at the time of the execution of this Agreement.

Id., at ¶11. The Severance Agreement also divested Hochberg of his role as director, officer and shareholder of HND-CT. Haymond testified that at the time of the Severance Agreement, he was

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[6]This claim was dismissed from Civil Action No. 99-5048 because Lundy's attorney admitted that he knew about Hochberg's indictment at the time the partnership agreement was negotiated.

unaware that HND-PA was no longer escrowing fees from H&L cases, and that he did not become aware of its failure to escrow until February 2002 after the Kellner report was released. Tr. 5/7/04 at 13/7-10.

Joint Litigation and Common Interest Agreement

On August 15, 2002, Haymond, the Haymond Law Firm and Lundy entered a Joint Litigation and Common Interest Agreement, which became binding on October 9, 2002. See Pl. Exh. 22, Joint Litigation and Common Interest Agreement (Aug. 15, 2002). At no time did Haymond, on behalf of himself or the Haymond Law Firm seek approval of Napoli, Diamond, Bernstein, Berman or Hochberg before this settlement with Lundy, as required by the June 29, 2000 Agreement. Stip. Facts. Neither Napoli, Diamond, Bernstein, Berman nor Hochberg were parties to the Joint Litigation and Common Interest Agreement.

II. Procedural History

The HND-PA parties brought the instant action in the Court of Common Pleas of Philadelphia against Haymond and the Haymond Law Firm for breach of contract and violation of the Pennsylvania Wage Act, for settling the litigation with Lundy without consulting them, and failing to pay their wages, as required by the June 29, 2000 Agreement. The Haymond parties removed to this court on the ground of diversity, and filed counterclaims

alleging breach of contract by HND-PA and breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg.

The claims made by the HND-PA parties against the Haymond parties were: (I) breach of contract for settling the litigation with Lundy without the consent of the HND-PA parties in violation of the June 29, 2000 Agreement; (II) violation of Pennsylvania Wage Act for failure to pay Napoli, Diamond, Bernstein, and Berman's salaries; (III) breach of oral promise of employment by Haymond to Diamond. The counterclaims made by the Haymond parties against the HND-PA parties were: (I) breach of contract by HND-PA for failure to repay amounts advanced as a loan by HND-CT to HND-PA; (II) breach of contract by HND-PA for failure to escrow fees; (III) breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg for failure to escrow fees; (IV) breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg as directors, officers and shareholders of HND-PA; (V) self-dealing and wilful misconduct by Napoli, Diamond, Bernstein, Berman and Hochberg as shareholders of a closely held corporation; and (VI) accounting of all cases referred by HND-CT to HND-PA.

Motions for Summary Judgment

The court, on consideration of cross-motions for summary judgment, found genuine issues of material fact on all claims and counterclaims, and denied the parties' motions. HND-PA v.

Haymond, No. 02-721 (E.D. Pa. Mar. 23, 2004) (Paper #177) (Order denying motions for summary judgment). On the HND-PA parties' claims, summary judgment was denied: on count I because there was a genuine issue of material fact whether Haymond or the Haymond Law Firm breached the June 29, 2000 Agreement and/or whether the alleged breach was justified by material breach on the part of the HND-PA parties; on count II because there were genuine issues of material fact whether: Napoli, Diamond, Bernstein and Berman were employed by HND-CT or HND-PA during the month of June; the payment Napoli, Diamond, Bernstein and Berman received in July was for work in June or work in July; and "the existing and future obligations" assumed by HND-PA included responsibility for past wages due Napoli, Diamond, Bernstein and Berman; and on Count III because there was a genuine issue of material fact as to whether, on or about October 14, 1999, Haymond, individually or on behalf of the Haymond Law Firm, promised to pay the salary of Diamond, and if so, for how long.[7] Id.

On the counterclaims, summary judgment was denied: on counterclaim I because there were genuine issues of material fact regarding the amount of money carried on the books of HND-PA

[7]The court's order inadvertently suggested there was a genuine issue of fact whether the oral promise had also been made to Napoli, Bernstein and Berman, but count III was only brought on behalf of Diamond. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Mar. 23, 2004) (Paper #177) (Order denying motions for summary judgment).

as “Advanced by Hartford”, and whether the funds were a loan or shareholders’ equity; on counterclaims II and III because there was a genuine issue of material fact whether plaintiffs were obligated to escrow fees; on counterclaim IV because there was a genuine issue of material fact whether the use of the escrow fund was illegal or wrongful; and on counterclaim V because there was a genuine issue of material fact whether the actions of Napoli, Diamond, Bernstein, Berman and Hochberg were improper self-dealing and willful misconduct. Id.

On consideration of an additional motion for summary judgment filed by the HND-PA parties, the court granted partial summary judgment for Hochberg because the release agreement precludes all claims “known and unknown, which HND and Haymond had or may have had at the time of the execution of the agreement.” HND-PA v. Haymond, No. 02-721 (E.D. Pa. Apr. 28, 2004) However, the court found a genuine issue of material fact whether the counterclaims had accrued as of April 6, 2001 so Hochberg was not terminated as a counterclaim defendant. The court also found a genuine issue of material fact whether the release agreement was applicable to Napoli, Diamond, Bernstein and Berman. (Paper #197) (Order denying partial summary judgment).

On consideration of a second additional motion for summary judgment filed by the HND-PA parties for a reduction of the

Haymond parties' claim of damages to reflect alleged errors in the Kellner Report, the court denied summary judgment without prejudice to what might be asserted at trial because: (1) the motion was improper in form; (2) the matters of which the motion complained were the subject of the litigation between Haymond and Lundy, affirmed on appeal and not subject to challenge by the HND-PA parties; the HND-PA parties were not parties so they are not bound by that result.

Motions in Limine

On consideration of the HND-PA parties' motion in limine and the Haymond parties' objections, the court limited the testimony of each of the parties' experts. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Nov. 7, 2003)(Paper #153)(Order limiting expert testimony). Abraham Reich, Esq. was not permitted to testify to the conclusions stated in his report dated August 15,2003; had he testified, John J. Hubbert, III, Esq. would not have been permitted to testify to the conclusions stated in his report dated September 4, 2003. Id.[8]

The court also limited Napoli from testifying if he remained

[8]The court also granted the Haymond parties' motion in limine to preclude reference to claims by Janice Tupper against defendants, and the HND-PA parties' motion in limine to preclude reference to the fact that defendants were not originally served with copies of the complaint. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Nov. 6, 2003)(Paper ##148 and 149) (Orders granting motions in limine).

trial counsel for himself, Diamond, Bernstein and Berman. ABA Rule 3.7 prohibits a lawyer from being an advocate in a trial where the lawyer is "likely to be a necessary witness." One of the rationales for prohibiting the dual lawyer-witness situation in a contested proceeding is to prevent confusion by the trier of fact with regard to the separate roles of an advocate and a witness. That rationale is explained as follows:

> Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client. The opposing party has proper objection where the combination of roles may prejudice that party's right in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Gordon v. Bechtel Int'l, No. 01-132, 2001 U.S. Dist. LEXIS 22432, 12-13 (D.V.I., 2001). Because Napoli was both a plaintiff and counterclaim defendant in the action, the court felt his role as advocate would be compromised if he were allowed to testify.

Trial

The trial was severed into three phases and the jury was presented with special interrogatories for each phase.[9] HND-PA

[9]The full text of the special interrogatories are attached as Appendix A. But the jury was asked the following questions and provided the following answers (in bold):

1. Have plaintiffs proved by a preponderance of the evidence that defendants materially breached the June 29, 2000 Agreement to the

detriment of HND-PA? **No**

2. Have the defendants proved by a preponderance of the evidence that Haymond Napoli Diamond, P.C., the Pennsylvania corporation, breached the June 29, 2000 agreement by:(a)failure to retain in escrow fees from Haymond & Lundy cases? **Yes**; (b) If so, was the breach material? **Yes**; (c) Did defendants know of the failure to escrow fees when they settled with Lundy? **Yes**

3. Have the defendants proved by a preponderance of the evidence that Haymond Napoli Diamond, P.C., the Pennsylvania corporation, breached the June 29, 2000 agreement by: (a) disregarding Haymond's rights as a shareholder of HND-PA? **Yes**; (b) If so, was the breach material? **Yes**; (c) Did Haymond know the disregard of his rights as a shareholder of HND-PA when he settled with Lundy? **Yes**

4. Did counterclaim plaintiffs prove by a preponderance of the evidence that as a result of the June 29, 2000 agreement, the funds advanced were to be considered Debt (a loan to be repaid) not Equity (capital that need not be repaid): **Yes**

5. Did counterclaim plaintiffs prove by a preponderance of the evidence that HND-PA had a duty to place fees from Haymond & Lundy cases in escrow and to maintain the fees from Haymond & Lundy cases in escrow? **Yes**

6. Have defendants proved by a preponderance of the evidence that paragraph 11 of said Agreement is inapplicable because Hochberg fraudulently failed to disclose facts relevant to the release? **Yes**

7. Has Scott Diamond proved by a preponderance of the evidence that John Haymond made a promise that Scott Diamond would be paid $150,000 salary plus benefits if he came to work for John Haymond or the Haymond Law Firm? **Yes**

8. Was the promise of John Haymond for a salary for one year? **No**

9. Was the promise of John Haymond made on behalf of: **The corporation (HND-CT / The Haymond Law Firm)**

10. Has Scott Diamond proved by the preponderance of the evidence the salary he received was less than the salary he was promised?

Yes If Yes, by what amount: $55,053.60

11. Have defendants John Haymond and the Haymond Law Firm proved by a preponderance of the evidence that the Agreement of June 29, 2000 transferred responsibility for Scott Diamond's salary claim to HND-PA? **Yes**

12. Is the Haymond Law Firm entitled to $1,340,655 as repayment of this loan? **Yes**

13. Is the $142,454 awarded by the court in the Haymond and Lundy litigation a credit against the $1,050,000 designated in the June 29, 2000 Agreement? **No**

14. Is the $262,325 awarded by the Court as Haymond's portion of the Clark fee a credit against the $1,050,000 designated in the June 29, 2000 Agreement? **No**

15. Has Counterclaim Plaintiff Haymond proven by a preponderance of a the evidence that any of the following named officers or directors of HND-PA knowingly participated in HND-PA's wrongful diversion of funds that should have been held in escrow? a) Andrew Napoli **Yes;** b) Scott Diamond **Yes;** c) Robert Hochberg **Yes;** d) Jack Bernstein **Yes;** e) David Berman **Yes**

16. Has Counterclaim Plaintiff Haymond proven by a preponderance of the evidence that any of the following named officers or directors of HND-PA intentionally concealed and misrepresented that funds had been diverted from escrow? a) Andrew Napoli **Yes;** b) Scott Diamond **Yes**; c) Robert Hochberg **Yes;** d) Jack Bernstein **Yes;** e) David Berman **Yes**

17. Has Counterclaim Plaintiff Haymond proven by a preponderance of the evidence that the following named officers or directors of HND-PA were unjustly enriched by the wrongful use of funds and/or the concealment of the wrongful use of funds that should have been held in escrow? a) Andrew Napoli **Yes**; b) Scott Diamond **Yes**; c) Robert Hochberg **Yes;** d) Jack Bernstein **Yes;** e) David Berman **Yes**

18. What amount, if any, should be awarded to John Haymond to compensate the loss of the funds that should have been held in escrow? **$ 1,050,000.00**

v. Haymond, No. 02-721, (E.D. Pa. Mar. 26, 2004)(Paper #181)(Order setting trial schedule). In the first phase, the jury, on consideration of liability for breach of contract and related counterclaims, found defendants had signed the Joint Litigation and Common Interest Agreement with Lundy without consulting with or obtaining consent from at least three of the five persons listed in paragraph 9 of the June 29, 2000 Agreement. The jury also found that this conduct was not a breach of their June 29, 2000 agreement because the HND-PA parties had materially breached the Agreement first by failing to retain fees from H&L cases in escrow and disregarding Haymond's shareholder rights. The jury found that the June 29, 2000 agreement transferred to HND-PA Haymond's obligation to escrow fees from H&L cases. The jury also found that the $1,509,310 HND-CT had advanced to HND-PA was not equity but debt. Finally, the jury found that Hochberg fraudulently failed to disclose facts relevant to the release from claims included in paragraph 11 of the Severance and Settlement Agreement between Hochberg and Haymond.

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19. Has Counterclaim Plaintiff Haymond proven by a preponderance of the evidence that any of the Counterclaim Defendants committed acts so outrageously wrongful that they should be responsible to the Counterclaim Plaintiff for punitive damages? If so, in what amount? (The amount of punitive damages should be reasonably related to the amount of compensatory damages, but may be more or less than the amount of compensatory damages.) **Robert Hochberg: $279,999.99**

In the second phase, the jury, on consideration of Diamond's wage claim, found that Haymond had promised Diamond an annual salary of $150,000 if he came to work for Haymond.[10] Although the jury found Diamond had received $55,053.60 less than $150,000, it also found the June 29, 2000 Agreement, to which Diamond was a party, transferred responsibility for Diamond's salary to HND-PA.

In the third phase, the jury considered individual liability and damages. The jury found the Haymond Law Firm was entitled to $1,350,655 as repayment of its loan to HND-PA. The jury found that $142,454 awarded by the court in the Haymond and Lundy litigation, and $262,325 awarded by the court as Haymond's portion of the Clark fee, were not credits against the $1,050,000 designated for Haymond in the June 29, 2000 Agreement. The jury also found Napoli, Diamond, Bernstein, Berman and Hochberg had knowingly participated in the wrongful diversion of escrow funds, intentionally concealed and misrepresented that the funds had been diverted from escrow, and had been unjustly enriched by the wrongful use of the funds. The jury awarded the Haymond Parties $1,050,000 in compensatory damages, and $279,999.99 in punitive damages against Hochberg only.

[10]The HND-PA parties' count II (Pennsylvania Wage Act claim) was withdrawn with prejudice, therefore was not presented to the jury.

Judgment

By Order of May 21, 2004, civil judgment was entered on the jury verdicts. HND-PA v. Haymond, No. 02-721, (E.D. Pa. May 21, 2004)(Paper #228) (Order entering civil judgment), amended by, HND-PA v. Haymond, No. 02-721, (E.D. Pa. May 26, 2004)(Paper #233). On Count I (Breach of Contract of the June 29, 2000 Agreement), judgment was entered in favor of the Haymond parties and against HND-PA, Napoli, Diamond, Bernstein and Berman; on Count III (breach of contract for the oral promise to pay Scott Diamond's wages), judgment was entered in favor of the Haymond parties and against Diamond. On the counterclaims, on counterclaim I (breach of contract for amounts advanced by HND-CT to HND-PA and costs of suit), judgment was entered in favor of the Haymond parties and against HND-PA in the amount of $1,345,655.00; on counterclaims II and III (breach of contract by HND-PA, and breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg, for failure to escrow fees), judgment was entered in favor of Haymond and against the HND-PA parties in the amount of $1,050,000.00; on counterclaim IV (breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg as directors/officers/ shareholders), judgment was entered in favor of the Haymond parties and against Hochberg only for punitive damages in the amount of $279,999.99. Counterclaim Count V (self-dealing and wilful misconduct by shareholders of a

closely held corporation) was severed by agreement of counsel. Counterclaim VI (requesting accounting of all cases referred by HND-CT to HND-PA) was withdrawn as moot.

After the jury verdict, the HND-PA parties timely filed the instant motions for judgment as a matter of law under Fed. R. Civ. P. 50, a new trial under Fed. R. Civ. P. 50 and 59, and to alter or amend the judgment under Fed. R. Civ. P. 59.

III. Discussion

A. Standards of Review

Fed. R. Civ. P. 50 provides that a party may move for judgment as a matter of law on any claim or defense when there was no legally sufficient evidentiary basis for a reasonable jury to find for a party on that issue.[11] A motion for judgment as a matter of law under Fed. R. Civ. P. 50 may be granted when, viewing the evidence in the light most favorable to the non-moving party, there is insufficient evidence from which a jury could reasonably find liability. Wittekamp v. Gulf & Western, Inc., 991 F. 2d 1137, 1141 (3d Cir. 1993).

[11]Under Fed. R. Civ. P. 59(a)(2), such a motion may be made at any time before submission of the case to the jury. Fed. R. Civ. P. 50(b) provides that if such motion is not granted by the court before submission at the close of evidence, the issues are deemed submitted to the jury "subject to the court's late deciding the legal questions raised by the motion."

Under Fed. R. Civ. P. 50 and 59(a), a court's decision to grant a new trial is discretionary. Blancha v. Raymark Industries, 972 F. 2d 507, 512 (3d Cir. 1992). A new trial may be granted for a prejudicial error of law if the verdict is against the weight of the evidence. Maylie v. Nat'l Railroad Passenger Corp., 791 F. Supp. 477, 480 (E.D. Pa. 1992), aff'd 983 F. 2d 1051 (3d Cir. 1992).

A motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) may be granted if there was a clear error of law or to correct manifest injustice. NL Industries v. Commercial Union Insurance Co., 65 F. 3d 314, 324 n.8 (3d Cir. 1995). The purpose of a Fed. R. Civ. P. 59(e) motion is to correct manifest errors of law or fact. Harsco Corp. V. Zlotnicki, 7799 F. 2d 906, 909 (3d Cir. 1985).

B. HND-PA's Obligation to Escrow Fees *(Motion Nos. 16, 18 & 52)*

The HND-PA parties argue it was plain error for the court to: (1) refer to a "court order" requiring the HND-PA parties to hold fees in escrow; and (2) submit to the jury whether the June 29, 2000 Agreement was breached by the failure to escrow fees. Indeed, throughout the trial, the HND-PA parties argued that they had no obligation to escrow fees from H&L cases and that there was no court order obligating the HND-PA parties to escrow fees.

The letter agreement between Haymond and Lundy requiring the escrow of fees from H&L cases entered as an order by Receiver Heller on December 12, 1999 created an obligation for "all attorneys and non-attorneys" of Haymond's firm. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767, at *3-*4. Under the August 31, 2001 judgment entered in Civil Action No. 99-5048, Haymond had an obligation to escrow the portion of the fees owed to Lundy. The judgment order stated: "Additional net fees received from H&L cases by the parties shall be placed in escrow pending an approval of the amount and distribution by the Receiver." Haymond v. Lundy, 177 F. Supp. 2d at 390. This court order indisputably applied to Haymond and his law firm.

As the jury correctly found, the June 29, 2000 Agreement transferred these obligation to HND-PA. The Agreement provided that HND-PA shall assume "all obligations and liabilities" of HND-CT, including "all other existing and future obligations." Pl. Exh. 5, ¶6. Napoli, Diamond, Bernstein, Berman and Hochberg were named in the Agreement and were parties to the Agreement. Each of them had the contractual obligation to place fees from H&L cases in escrow; it was stipulated that each of the attorneys was aware of this obligation. The HND-PA attorneys did initially escrow the fees, even if they eventually ceased to place funds in escrow. There was no error of law in the court's references to the HND-PA parties' obligation to escrow the fees.

C. Collateral Estoppel (Motion Nos. 1 & 22)

The HND-PA parties contend the court erred as a matter of law by ruling that the Haymond parties were not collaterally estopped from denying that Haymond and HND-PA were in privity and Haymond had tacit knowledge of HND-PA's failure to escrow fees. In Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767, *25 (E.D. Pa. 2002), aff'd 79 Fed. Appx. 503 (3d Cir. 2003), this court assumed privity between Haymond and HND-PA and as between Lundy and Haymond, attributed to Haymond HND-PA's decision not to escrow the funds in order to avoid the consequences of the Receiver's Order. But the HND-PA parties were not parties to that action, and the dispute between Haymond and the HND-PA parties was left for another day.

The Supreme Court's decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), definitively addressed when collateral estoppel applies. Parklane was a stockholders' class action based on claims that the defendant had issued a proxy statement that was materially false and misleading. While the action was pending, the Securities and Exchange Commission obtained a declaratory judgment in an enforcement action that held the proxy materials false and misleading. The class action plaintiffs then moved for summary judgment on those issues. The trial court denied the motion, the Court of Appeals for the Second Circuit reversed, and the Supreme Court affirmed the

decision of the Court of Appeals, holding that the Parklane company was not entitled to relitigate the issue of the false and misleading nature of the proxy materials.

In Parklane, the court addressed whether one party could be bound by a prior determination when the other party was not, and whether doing so in a jury case based on a prior decision in a bench trial deprived the affected party of a jury trial in contravention of the Seventh Amendment to the United States Constitution.[12] 439 U.S. at 326. The dual purpose of collateral estoppel (often called "issue preclusion"), like the doctrine of res judicata, is to protect litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. But unlike res judicata, where judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action, under the doctrine of collateral estoppel, in a second action upon a different cause of action, a prior judgment against a party

[12]The court differentiated between "offensive" and "defensive" use of collateral estoppel. In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant. The HND-PA parties appear to argue that both "offensive" and "defensive" use of collateral estoppel apply. 439 U.S. at 326 at n. 4

precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Id., at 327.

The prerequisites for collateral estoppel are satisfied when: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment. Nat'l R.R. Passenger Corp. v. Penna. Pub. Util. Comm'n, 288 F. 3d 519, 525 (3d Cir. 2002). This general rule is subject to a number of equitable exceptions, including: (1) whether both parties to the subsequent suit were also parties to the first so that there is "mutuality of estoppel"; and (2) whether the estoppel is being asserted (a) "offensively" by a plaintiff seeking to estop a defendant from relitigating the issues when the defendant has previously litigated and lost, or (b) "defensively" by a defendant seeking to estop a plaintiff from relitigating an issue which the plaintiff has previously litigated and lost. Id.

In the instant action, the issue presented (whether Haymond knew and/or approved of HND-PA's failure to escrow fees) is the same, but the other prongs of the test are not satisfied. First, the issue of whether Haymond and HND-PA were in privity was not actually litigated. The factual finding, that Haymond's testimony regarding his knowledge of HND-PA's decision was not

credible, was made when the court denied Lundy's Motion to Effectuate Jurisdiction, in order not to prejudice Lundy by delaying the distribution of assets. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767, *31 (E.D. Pa. 2002). The court was explicit that its assumption that Haymond knew about the diversion of the escrow fees, was made only for the purpose of distributing H&L's assets. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15770, *12 (E.D. Pa. 2002). The court decided that the instant dispute between Haymond and HND-PA over the failure to escrow fees was an issue distinct from the dispute then before the court. Haymond v. Lundy, 2002 U.S. Dist. LEXIS 15767, at *30 ("The legal consequences of the changing nature of the parties' relationship to each other, the interaction between those relationships and the court's Orders, and the consequences of future collections by HND-PA, may be addressed elsewhere."). The court, in noting that the pending Civil Action No. 02-721 might afford Haymond the opportunity to address these issues with the HND-PA parties, assumed collateral estoppel would not apply. Id., at n. 13.

Second, the court's finding with regard to Haymond's knowledge was not "essential to the judgment." The Restatement (Second) of Judgment explains the rationale behind the requirement that the initial resolution of the relevant issue be essential to the judgment:

> If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

RESTATEMENT (SECOND) OF JUDGMENTS, §27, cmt. h. Whether the issue was essential to the judgment is determined by evaluating whether the issue was critical to the judgment or merely dicta. Nat'l R.R. Passenger Corp., 288 F. 3d at 527. If the court had ruled differently on the issue of Haymond's knowledge in Civil Action No. 99-5048, it would not have changed the judgment entered because the terms of the judgment were defined by the settlement agreement between Haymond and Lundy; it would not have delayed the entry of judgment or changed the dollar amount for which judgment was entered.

Even if the prerequisites for collateral estoppel were satisfied, equitable concerns made it inappropriate to foreclose relitigation of the issue of Haymond's knowledge. The Supreme Court has granted district courts "broad discretion" to determine when a plaintiff who has met the requisites for the application of collateral estoppel may employ that doctrine offensively. Raytech Corp. v. White, 54 F.3d 187, 195 (3d Cir. 1995). The general rule should be that in cases where a plaintiff could

easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. Parklane, 439 U.S. at 331.

First, the HND-PA parties were *not* parties to Civil Action No. 99-5048; HND-PA voluntarily withdrew its motion to intervene in that action, Haymond v. Lundy, No. 99-5048 (Paper #324), and the court denied Lundy's motion to effectuate jurisdiction over HND-PA. Haymond v. Lundy, No. 99-5048, 2002 U.S. Dist. LEXIS 15767 (E.D. Pa. 2002). Second, preclusion may be withheld when the party against whom it is invoked can avail himself of procedures in the second action not available to him in the first action, which may be significantly influential in determination of the issue. Restatement (Second) of Judgments §29, cmt. d. These procedural differences can include differences in discovery devices and a plenary as distinct from summary hearing. Id. The Haymond parties did not have access to discovery on the totality of the issues related to the escrow of fees, and the court made its decision based on a limited hearing on Lundy's motion to effectuate jurisdiction.

Finally, the Parklane decision addresses the right to trial by jury under the Seventh Amendment. The Supreme Court held that if a party has had a full and fair trial of an issue in a prior

non-jury trial such as an equity proceeding, there is no constitutional right to relitigate the issues in a jury trial. Parklane, 439 U.S. at 333. But here there was no such opportunity to fully and fairly litigate the issue in Civil Action No. 99-5048. The court made a credibility determination regarding Haymond's testimony without the benefit of contrasting the credibility of Hochberg, Bernstein and Diamond's testimony. To have removed the credibility issue, as well as the factual determinations based on an assessment of credibility from the jury, would have deprived the Haymond parties of the jury trial to which they were entitled under the Seventh Amendment. If the court wanted to make those same determinations as to credibility and facts in the equitable portion of the instant action, it would have been precluded from doing so until after the jury decided all the issues to be submitted to it for decision of the legal claims in issue. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Lytle v. Household Mfg. Co., 494 U.S. 545 (1990). There was no error of law in the court's finding that collateral estoppel did not preclude presenting to the jury the issue of Haymond's knowledge of the HND-PA failure to escrow fees.

D. Tort Claims (Motion Nos. 23, 24, 29, 30, 31, 32, 33 & 49)

The HND-PA parties contend the court erred as a matter of

law by permitting the Haymond parties to submit counterclaims I through IV to the jury. They claim the court controverted the "gist of the action doctrine," which bars recovery in tort where a cause of action is breach of contract, when the success of the tort action is wholly dependent on the terms of a contract. Etoll, Inv. v. Elias/Savion Advertising, Inc., 811 A. 2d 10, 14 (Pa. Super. 2002).

If rights are specified by contract, one cannot ordinarily recover in contract for breach and in tort arising from the same performance or non-performance under the contract. People Mortg. Co., Inc. v. Federal Nat'l Mortg. Ass'n, 856 F. Supp 910, 929-30 (E.D. Pa. 1994). However, the HND-PA parties misconstrue the nature of the claims against them. Counterclaims I and II stated claims for breach of contract against *HND-PA* only for failure to repay the funds advanced by HND-CT, and for failure to escrow fees. See, Defendants' Answer and Counterclaim to Second Amended Complaint (Paper #81). Counterclaims III and IV stated claims for breach of fiduciary duty against Napoli, Diamond, Bernstein, Berman and Hochberg. Id. The gist of the action applies to claims made against the same party, whereas here, the breach of contract claims were against the corporate entity HND-PA and the breach of fiduciary claims were against Napoli, Diamond, Bernstein, Berman and Hochberg in their individual capacities. Because the claims and parties are distinct, the gist of the

action doctrine was not implicated.

Further, Fed. R. Civ. P. 54(c) permits recovery on any theory supported by the evidence. The overwhelming weight of the evidence supported findings of individual liability on all the counterclaims.

E. Individual Liability *(Motion Nos. 19, 20, 23, 24, 29, 30, 32, 35, 49 & 51)*

Napoli, Diamond, Bernstein, Berman and Hochberg contend the court erred as a matter of law in permitting the jury to find individual liability because: (1) there was no fiduciary obligation between the parties; (2) Haymond did not sufficiently allege injury; (3) breach of fiduciary duty claims sound in equity and are inappropriate for a jury; and (4) there was insufficient evidence to support findings of individual liability.[13]

Counterclaims III and IV each alleged breach of fiduciary duty, but under different theories. Counterclaim III alleged breach of fiduciary duty by Napoli, Diamond, Bernstein, Berman and Hochberg for having participated in the wrongful acts of the corporate entity, HND-PA. Pennsylvania law recognizes the

[13]Although the HND-PA parties made general objections to the individual liability claims going forward, there were no objections to the charge on this issue and any objections are waived. Federal Deposit Ins., 978 F. 2d at 16.

participation theory, i.e. an individual corporate officer may be held liable for participating in the corporation's tortious acts. Village at Camelback Property Owners Ass'n v. Carr, 538 A. 2d. 528, 533 (Pa. Super. 1988). Counterclaim IV alleged breach of fiduciary duty owed by Napoli, Diamond, Bernstein, Berman and Baker as directors, officers and shareholders of the HND-PA corporation. Officers and directors of a corporation owe a fiduciary duty – a duty of loyalty – to the corporation and to its shareholders to act only for the benefit of the corporation and the shareholders and to make proper disclosure of corporate activity. Tyler v. O'Neill, 994 F. Supp. 603, 612 (E.D. Pa. 1998).

By virtue of the June 29, 2000 Agreement, Napoli and Diamond were directors and shareholders of HND-PA. Pl. Exh. 5, ¶7. At least from and after November 27, 2000, Hochberg was also a director. D. Exh. 7, Minutes of First Meeting of Shareholders (Nov. 27, 2000)("Robert Hochberg be and he is hereby is elected as a Director of the Corporation."); D. Exh. 8, Minutes of First Meeting of Board of Directors of Haymond Napoli Diamond, P.C. (Nov. 27, 2000)("The following Directors were present, constituting a quorum: Andrew Napoli, Scott Diamond, Robert Hochberg."). Also as of November 27, 2000 and after, all the individual HND-PA parties were officers: Napoli was President, Diamond, Berman and Bernstein were Vice-Presidents, and Hochberg

was Secretary and Treasurer. D. Exh. 8. All the HND-PA parties were shareholders as of November 27, 2000. Id.

A fiduciary relationship also arose from Hochberg's appointment as manager of HND-PA, and his responsibility, as Haymond's agent, with the other members of HND-PA, to administer the funds and affairs of HND-PA for the mutual benefit of themselves, Haymond and HND-CT. See, Defendants' Answer and Counterclaim to Second Amended Complaint (Paper #81). An agency relationship is a fiduciary one, and the agent is subject to a duty of loyalty to act only for the principal's benefit. Basile v. H & R Block Inc., , 761 A. 2d 1115, 1120 (Pa. 2000). Hochberg's fiduciary responsibility derived from the June 29, 2000 Agreement, the substantial funds advanced by HND-CT to HND-PA, and the confidential relationship resulting in the reliance existing between Haymond and Hochberg. In all matters affecting the subject of the agency, the agent must act with the utmost good faith in furthering the principal's interests, including disclosing all relevant information to the principal. Id. Hochberg consistently led Haymond to believe that he was representing his interests in the operations of HND-PA. Tr. 5/7/04 27/9-21.

The HND-PA parties argue the Haymond parties' claims for breach of fiduciary duty fail because Haymond failed to prove injury in his capacity as a shareholder. Kessler v. Broder, 851

A. 2d 944 (Pa. Super. 2004). Under Pennsylvania law, majority shareholders have a duty not to use their power in such a way to exclude minority shareholders from their proper share of benefits accruing from the enterprise. Viener v. Jacobs, 834 A.2d 546, 556 (Pa. Super. 2003). An attempt by a group of majority shareholders to "freeze out" minority shareholders for the purpose of continuing the enterprise for the benefit of the majority shareholders constitutes a breach of the majority shareholders' fiduciary duty to the minority shareholders. Id. The overwhelming weight of the evidence revealed that although aware of their obligation to escrow fees from H&L cases, Napoli, Diamond, Bernstein, Berman, and Hochberg ceased escrowing fees, misrepresented and concealed the fact they had ceased escrowing fees from Haymond, and used these funds for their own benefit. The injury to Haymond is that he was deprived of these assets and yet charged them having as part of the judgment entered in Civil Action No. 99-5048.[14] This was sufficient to prove injury to Haymond as a shareholder as a result of the breach of fiduciary duties alleged in counterclaim IV.

For the alleged breach of fiduciary obligations in

[14]The HND-PA parties also advance the spurious argument that the decision to cease escrow of fees was in the best interest of HND-PA, because otherwise HND-PA would have gone out of business. It is never in the “best-interest” of a corporation to violate a court order or breach a binding contract.

counterclaim III, for participating in the wrongful acts of the corporation, Haymond had to prove injury to the interests of the corporation, not injury as a shareholder. A corporation has a cause of action against its officers and directors for breach of a fiduciary duty. Fitzpatrick v. Shay, 461 A. 2d 243, 256 (Pa. Super. 1983).[15] A shareholder may bring the action on behalf of the corporation. Id., at 256. The overwhelming weight of the evidence demonstrated such harm.

Third, the HND-PA parties argue a claim of breach of fiduciary duty sounds in equity regardless of the type of relief ultimately sought by the complaining shareholder, so the court's submission of the breach of fiduciary claim to the jury was plain error.

The HND-PA parties' statement of the law is incorrect; a breach of fiduciary duty may give rise to relief in the form of damages and/or equitable relief. See, Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A. 2d 1277, 1288 (Pa. 1992); Boyd v. Cooper, 410 A.2d 860, 861 (Pa. Super. 1979). Although a party ordinarily does not have a right to a jury trial in an equitable proceeding, where the equitable remedy, such as an accounting, is in essence a claim for repayment of a debt, the claim may be

[15]Judgment on counterclaim IV was entered for Haymond and the Haymond Law Firm because the duties owed by Hochberg, as an agent of the corporation, were owed to the corporation.

tried to a jury. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding that an accounting must be tried to a jury where it is in actuality a claim for repayment of a debt); Charles Alan Wright & Arthur R. Miller, 9 FEDERAL PRACTICE & PROCEDURE § 2310, at 87-91 (2d ed. 1994). The questions submitted to the jury were whether the HND-PA parties had an obligation to escrow fees as a result of the June 29, 2000 Agreement, and whether the HND-PA parties intentionally concealed and misrepresented that funds had been diverted from escrow.[16] Paper ##220, 221. The jury was not asked what equitable remedy, if any, should be imposed; the jury considered only the individual HND-PA parties' liability for compensatory damages.

Finally, the HND-PA parties contend the court erred because the weight of the evidence was insufficient to support personal liability of Napoli, Diamond, Bernstein, Berman and Hochberg. The test of liability for breach of fiduciary duty is whether the officer, director, or shareholder was unjustly enriched by his actions. Tyler, 994 F. Supp. at 612. The record is replete with admissions by each of the HND-PA individuals that they took

[16]The charge on these issues is at Tr. 5/20/04 at 147/20-148/7. There was no objection to that portion of the charge, so any objections now have been waived. Federal Deposit Ins. Corp. v. World University Inc., 978 F. 2d 10, 16 (1st Cir. 1992); Valentin v. Crozer-Chester Medical Center, 986 F. Supp. 292, 302 (E.D. Pa. 1997). But in abundance of caution, the court here addresses the merits of the objection.

actions inconsistent with their obligations to the Haymond parties. There was substantial evidence of statements made by and on behalf of the HND-PA parties that the escrow was being maintained when in fact it was not. See, e.g. Tr. 5/6/04 at 43/19-45/8, 69/12-70/9; Tr. 5/7/04 at 6/1-7/19, 87/8-88/1. The jury could find that those statements constituted intentional misrepresentation and concealment.

F. Unjust Enrichment (Motion Nos. 36, 38, 39)

The HND-PA parties contend that the court erred as a matter of law by submitting claims of unjust enrichment to the jury, because: (1) unjust enrichment must be proved to award damages for breach of fiduciary duty; (2) breach of fiduciary duty is inherently equitable in nature; and there was no evidence demonstrating unjust enrichment to the Haymond parties. The HND-PA parties seem confused about the nature of the claims against them; there was no independent claim for unjust enrichment. Counterclaims III and IV each stated claims for breach of fiduciary duty under different theories.

Unjust enrichment is the predicate for damages under both claims, Tyler, 994 F. Supp. at 612, and damages are an appropriate remedy for breach of fiduciary duty. Boyd, 410 A.2d at 861. The record contains several instances of wrongful application of corporate funds for the personal benefit of the Napoli, Diamond, Bernstein, Berman and Hochberg: the jury was

entitled to rely on that evidence to find unjust enrichment. Tr. 5/6/04 at 145/25-146/23; Tr. 5/10/04 at 129/8-130-17. There was no error of law in submitting counterclaim III to the jury.

G. Loan/Equity Issue (Motion Nos. 8, 9, 10)

The HND-PA parties argue they are entitled to judgment as a matter of law despite the jury's finding that the $1,340,655.00 was debt not equity because the evidence did not support the jury's finding, and the court did not instruct the jury on the doctrine of laches.

The June 29, 2000 Agreement established the amount advanced by HND-CT for the operation of HND-PA was considered a loan, and it was always the expectation of Haymond that he would be repaid the funds advanced. Pl. Exh. 5; Tr. 5/7/04 13/13-19, 28/7-22. A debt with no specified term is a demand obligation, 13 Pa. C.S. §3108(a)(2), and the absence of an interest rate implies the legal rate, 41 Pa. C.S. §202; Nagle Engine & Boiler Works v. Erie, 38 A. 2d 225 (1944)("Interest 'is complete due, wherever a liquidated sum of money is unjustly withheld. It is a legal and uniform rate of damages allowed, in the absence of express, contract, when payment is withheld, after it has become the duty of the debtor to discharge his debt."). The HND-PA parties' expert witness John Edward Mitchell admitted in his testimony that a debt obligation could exist by agreement even in the

absence of a note or other evidence of the terms. Tr. 5/10/04 at 119/2-120/1.

The June 29, 2000 Agreement provided that the funds advanced by Haymond "shall be carried on the books of HND-PA as loans or capital contributions from HND-CT or such other entity or parties as shall be determined by John Haymond in his sole discretion." Pl. Exh. 5, ¶2. The HND-PA parties argue that because the corporate tax returns for HND-PA treated the funds as equity, Haymond reaped the benefits of tax losses for the years 1999, 2000, 2001 and 2002. Even if this were true, the parties' misrepresentations on their tax forms do not convert funds advanced to equity as a matter of law. The June 29, 2000 Agreement, and Haymond's reliance thereon, provide evidence that the funds were a loan.

The doctrine of laches is irrelevant to the loan/equity issue in this action. The doctrine of laches is an affirmative defense which addresses inexcusable delay on the part of the party bringing a claim, to the prejudice of the party asserting the defense. Degussa v. Construction Chemical Operation, 280 F. Supp. 2d. 393, 411 (E.D. Pa. 2003). If a suit is brought within the statute of limitations, the equitable defense of laches is presumptively inapplicable. Mantilla v. United States, 302 F.3d 182, 186 (3d Cir. 2002), cert. denied,538 U.S. 969 (2003). The statute of limitations for breach of contract in Pennsylvania is

4 years so Haymond's action was timely brought. 42 Pa. C.S. §5525 (2004).

Further, the HND-PA parties presented no evidence that they were prejudiced by Haymond not pressing them for repayment sooner. On the contrary, HND-PA benefitted by not making repayment of the funds advanced, because it was able to use the funds to stay in business. There was nothing in the record of this trial that warranted a charge on the issue of laches.

H. Punitive Damages (Motion Nos. 40, 46, 47)

The HND-PA parties argue there was no basis to award punitive damages as a matter of law. They assert that there was no evidence to support the award of punitive damages against Hochberg only, and the court misstated the standard for the award of punitive damages.[17]

Punitive damages are awarded to punish a defendant for outrageous acts and to deter him or others from engaging in similar conduct. Viener v. Jacobs, 834 A. 2d 546, 560 (Pa. Super. Ct. 2003). Under Pennsylvania law, a reasonable relationship must still exist between the nature of the cause of action underlying the compensatory award and the decision to

[17]Although the HND-PA parties objected generally to the issue of punitive damages, Tr. 5.20/04 at 12, there was no objection to the charge on this issue and any objections are waived. Federal Deposit Ins., 978 F. 2d at 16.

grant punitive damages. Id. The factors which may be considered in an award of punitive damages are: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant. Id. But evidence of personal wealth is not mandatory in the determination of punitive damages and the polestar is the degree of the defendant's reprehensible conduct. Id., citing, Shiner v. Moriarty, 706 A.2d 1228, 1241-42 (Pa. Super. 1998).

Jury interrogatory No. 8 of 5/21/04 (Paper #227) properly states the criteria for the award of punitive damages, and the standard was further explained in the court's charge to the jury. Tr. 5/20/04 152/12. There was substantial evidence that Hochberg knew there were not H&L funds in escrow long before the Severance and Settlement Agreement was executed on April 6, 2001, but Hochberg failed to disclose or actively concealed this information from Haymond. Tr. 5/6/04 at 69/12-70/9; Tr. 5/7/04 at 7/7-19; Tr. 5/10/04 at 36/19-37/9, 54/1-25, 65/12-70/4; Exh. D. 65. The evidence fully supported the court's charge and the jury's finding on punitive damages, and there was no error of law.

I. Jury Interrogatories and Responses (Motion Nos. 16 & 21)

The HND-PA parties argue the jury interrogatories were confusing and resulted in findings contrary to law and evidence with regard to: (1) the finding in Interrogatory No. I, Question

1 (Paper #220) that the Haymond parties did not materially breach the June 29, 2000 Agreement; (2) the finding in Interrogatory No. II, Question 1 (Paper #221) that Haymond promised Diamond he would be paid $150,000 salary plus benefits if he came to work for the Haymond Law Firm.

With regard to the jury's finding the Haymond parties had not materially breached the June 29, 2000 Agreement, the HND-PA parties argue that it was stipulated that the Haymond parties did not perform according to the terms of the Agreement by settling with Lundy, so it was prejudicial error to include that question to the jury. However, as the jury was instructed, breach of contract is the nonperformance of a contractual duty and a breach may be either material or immaterial; only material breaches excuse future performance. RESTATEMENT OF CONTRACTS, 2D §237 (1981). Even though the parties had stipulated to non-performance, the jury was entitled to find whether any non-performance was material. The jury found that *prior* to the settlement between Haymond and Lundy, the HND-PA parties' material breach of the June 29, 2000 Agreement, excused future non-performance of the Agreement by Haymond. Id. As the jury was instructed, since performance was excused, the failure to perform was not a breach. Id.; Tr. 5/13/04 at 124/10-14. There was nothing inconsistent about the jury's findings.

The jury found that Haymond had promised Diamond a $150,000

salary plus benefits if he came to work at the Haymond Law Firm, the answer to Interrogatory No. 2, Question 1 is consistent with the testimony that Haymond offered to employ the lawyers who had been employed by H&L at the same salary as they had been earning. Paper #221. The jury found in Question 2 that a definite term of one year was not part of the offer. Id. The jury's answer to Question 3 established that the offer was made on behalf of HND-CT not Haymond individually. In Question 4, the jury agreed that Diamond received less than $150,000 in annual salary, but in Question 5 it found that the responsibility for the salary payment had been transferred to HND-PA by the June 29, 2000 Agreement. Because there was no conflict in these responses, there was no error of law.

J. Charge and Court's Comments

1. Fraud (Motion Nos. 12, 28, 31, 33, 42, 44, 45)

Reiterating their arguments that it was an error of law for the court to submit issues of tortious conduct and individual liability to the jury, the HND-PA parties argue that the court failed to instruct the jury properly on the issue of fraud.[18] Arguing that "intentional concealment" and "fraud" are legally the same concepts, they assert that allegations of fraud suffused

[18]There was no objection to the charge on the issue of fraud by concealment, and any objections are waived. Federal Deposit Ins., 978 F. 2d at 16.

the tort claims of the HND-PA parties. They correctly note that the only instruction given by the court on the term "fraud" related to Hochberg's fraud in concealing the failure to escrow fees when he signed the Settlement and Severance Agreement with Haymond. Tr. 5/13/04, at 128-130.

The HND-PA parties again misconstrue the individual liability claims against them. As the jury was instructed, to find individual liability, the jury had to find that the HND-PA parties had intentionally made misrepresentations to the Haymond parties regarding the escrow of H&L fees, Village at Camelback, 538 A. 2d. at 533, and that they were unjustly enriched by the wrongful use of the fees. Tyler, 994 F. Supp. at 612. There was no requirement the jury make a finding of fraud, and no error of law by the court.

2. Haymond's Knowledge About the Escrow Account (Motion Nos. 1 and 22)

The HND-PA parties argue the court erred by: (1) not informing the jury about its finding in Civil Action No. 99-5048 that Haymond had knowledge of and tacitly approved the use of the escrow funds for HND-PA's expenses; and (2) allowing the jury to find personal liability of the HND-PA parties because the unchallenged evidence at trial was that Hochberg acted as Haymond's agent to remove the fees from escrow with Haymond's full authority and approval.

The HND-PA parties misconstrue the court's findings in Civil Action No. 99-5048, and the parties in the instant action were not bound by the court's prior findings. Collateral estoppel did not apply because the HND-PA parties were not parties to the prior litigation between Haymond and Lundy, and the issues before the court were different. Collateral estoppel was an issue for the court not the jury, especially in the unusual circumstances of this case. Although the court did give the jury an overview of what happened in the Haymond and Lundy litigation, Tr. 5/20/04 at 142/14-144/9, it would have been unduly prejudicial for the court to take judicial notice of it's assumption in the prior litigation because the jury might have been improperly influenced. There was substantial evidence that Hochberg knew that the escrow had been eliminated long before the Severance and Settlement Agreement was executed on April 6, 2001, and he failed to disclose or actively concealed this information from Haymond. Tr. 5/6/04 at 69/12-70/9; Tr. 5/7/04 at 7/7-19; Tr. 5/10/04 at 36/19-37/9, 54/1-25, 65/12-70/4; Exh. D. 65. The jury was entitled to find that Hochberg was no longer acting as Haymond's agent. There was no error of law.

3. Escrow Accounts & the Haymond Parties (Motion Nos. 15, 19, 20, 34)

The HND-PA parties argue the court erred because it confused the jury by: (1) misrepresenting the escrow requirements; and (2)

blurring the distinction between Haymond and his law firm.

Although the relationships and obligations between the various parties involved in the instant action and Civil Action No. 99-5048 may have been complex, the HND-PA parties provide no citation of any instance where the jury indicated confusion about the obligations between the parties, and none of the jury's answers to the special interrogatories indicate confusion about these obligations.

The HND-PA parties argue that the jury's award of damages of $1,050,000, against Napoli, Diamond, Bernstein, Berman and Hochberg personally for breach of fiduciary duty, the same amount as the damages for the HND-PA corporation's liability for breach of contract, is evidence of jury confusion. The jury was entitled to award damages jointly and severally against the individuals for Napoli, Diamond, Bernstein, Berman and Hochberg's participation in the wrongful acts of the corporation. Village at Camelback, 538 A. 2d. at 533. The special interrogatories clearly delineated the claims made, the parties by whom they were made, and the parties against whom they were made. There was no error of law.

4. Variance of Pleadings and Proof (Motion Nos. 12, 27, 28, 31)

The HND-PA parties argue there was a fatal variance between

the pleadings and proof and the court erred in submitting Counterclaim II, Counterclaim III and Counterclaim IV to the jury because: (1) counterclaim II did not state a claim against HND-PA and did not state a claim for contractual damages; (2) counterclaim III was pursued as a breach of contract claim; and (3) counterclaim IV was pursued as a breach of contract claim.

Counterclaim II states a claim against HND-PA for violation of its obligation to escrow fees from H&L cases. Defendants' Answer and Counterclaim to Second Amended Complaint, ¶¶35, 37 (Paper #81). One basis for this obligation was the June 29, 2000 Agreement. The Haymond parties were entitled to recover for breach of contract, despite any deficiency in the pleadings. Fed. R. Civ. P. 54(c). Counterclaim II requests damages in the amount of $1,532,948, the amount of escrow fees wrongfully diverted according to the Kellner Report (and charged to Haymond in the dispute with Lundy in Civil Action No. 99-5048), which is sufficient to state a claim for damages under the June 29, 2000 Agreement (obligating the HND-PA parties to escrow the fees).

Counterclaim III states a claim against the "individual counterclaim defendants" for having been "participants with HND-PA in the wrongful disposition of funds that should have been held in escrow..." Defendants' Answer, ¶39 (Paper #81). This clearly states a claim for breach of fiduciary duty under the participation theory. Contrary to the HND-PA parties'

allegation, the Haymond parties did not pursue counterclaim III as a breach of contract claim, but as a claim for breach of fiduciary duty because Napoli, Diamond, Bernstein, Berman and Hochberg participated in the wrongful acts of the corporation. Similarly, Counterclaim IV is a claim for breach of fiduciary duty owed to Haymond as a minority shareholder, and was not pursued as a breach of contract claim.

There was no fatal variance between the pleadings and the proof.

5. Hochberg Release and Fraudulent Inducement (Motion No. 42, 43, 44 & 45)

The HND-PA parties argue it was error to permit the jury to determine whether the release of claims between Haymond and Hochberg included in their Severance and Settlement Agreement was invalid because Hochberg fraudulently failed to disclose facts relevant to the release. They argue that because the Severance Agreement was a fully integrated written agreement with no ambiguous terms, the interpretation of the Severance Agreement was a question of law for the court.[19]

Although the Severance Agreement is a fully integrated

[19]Although there was no objection to the submission of this issue to the jury and the objection is waived, Federal Deposit Ins., 978 F. 2d at 16, the court here addresses the merits of the objection.

contract, this is not a matter of contract interpretation. Fraud in the formation of a release agreement does not vary the terms of an integrated document. The document on its face did not refer to the breach of escrow. A written release agreement is not binding where the party seeking to use the release to avoid claims has actively and knowingly concealed from the other party information regarding potential claims covered by the release. Iman v. Hausman, 512 A. 2d 41 (Pa. Super. 1986); Jenkins v. Peoples Cab Co., 220 A. 2d 669 (Pa. 1966). There was substantial evidence that Hochberg, as Haymond's agent, knew the escrow had been terminated but failed to disclose this to Haymond, his principal, before the Severance Agreement was executed. As the court instructed the jury, it was entitled to draw the conclusion that Haymond would not have released Hochberg from all claims had he known about the wrongful diversion of the escrow funds.

6. Kellner Testimony (Motion Nos. 11 & 50)

The HND-PA parties argue it was plain error for the court to limit the cross-examination of Jerome Kellner, the accountant who authored the Kellner Report, although they do not specify in what ways the testimony was limited or how they were prejudiced by the limitations. See generally, Tr. 5/5/04 at 152/13-175/17. The only relevance of the Kellner Report to the instant action was the fact that it reported HND-PA had removed and/or never placed in escrow $1,532,948 which Mr. Kellner, and the court, treated as

fees generated from H&L cases. How Mr. Kellner arrived at his conclusions was not an issue in this case and there was no error in limiting Mr. Kellner's testimony on irrelevant matters.

8. Reich and Rosen Testimony (Motion Nos. 13, 14 & 48)

The HND-PA parties argue it was plain error to allow Abraham Reich, Esq. and Paul Rosen, Esq. to testify because the court had ruled this testimony would not be allowed. This is simply not the case. In advance of trial, the court ruled that Reich would not be permitted to testify to conclusions of law. HND-PA v. Haymond, No. 02-721 (E.D. Pa. Nov. 7, 2003)(Paper #153)(Order limiting expert testimony). At no point did the court rule that Reich or Rosen would be precluded from testifying entirely.

The HND-PA parties argue that the testimony of both Reich and Rosen was irrelevant and unduly prejudicial. On the contrary, the testimony of each was relevant and admissible. Reich testified as an expert witness on the estimated cost of the Haymond parties continuing to litigate against Lundy in the absence of a settlement agreement (the act which constituted the material breach alleged by the HND-PA parties). Tr. 5/6/04 at 9/15 - 41/6. Fed. R. Evid. 702 permits experts to provide testimony which "will assist the trier of fact to understand the evidence or to determine a fact in issue." As an experienced Philadelphia litigator, Reich was well-qualified to provide

expert testimony, and the probative value significantly outweighed any unfair prejudice alleged by the HND-PA parties. Fed. R. Evid. 403. The HND-PA parties' argument that Reich's testimony was "persuasive" does not amount to prejudice.

Paul Rosen, the attorney who represented Lundy in the Haymond and Lundy litigation, testified to the circumstances under which the settlement occurred. This testimony was relevant because who was the first to violate the terms of the June 29, 2000 Agreement determined if a material breach excused future performance. Fed. R. Evid. 401. Rosen testified that negotiations led to settlement between Haymond and Lundy after the Kellner Report was issued, and that the negotiations resulted from the court's order directing mediation. Tr. 5/5/04 at 122/2 - 123/5.

Admitting the testimony of Reich and Rosen was not erroneous.

9. Court's Comments re. Liability (Motion No. 25)

The HND-PA parties argue the court erred by stating before the jury that joint and several liability was a proper remedy against Napoli, Diamond, Bernstein, Berman and Hochberg. Tr. 5/20/04 at 135/20 - 136/2. Contrary to the HND-PA parties' assertion, the court's comments about joint and several liability were not made sua sponte, but in response to an objection by

counsel for the Haymond parties, Id., at 135/17 - 136/7, to the spurious argument made by counsel for the HND-PA parties that the jury was being asked to award double damages. Id., at 133/18 - 134/8. The court correctly stated that if the jury awarded damages against Napoli, Diamond, Bernstein, Berman and Hochberg for their participation in the wrongful conduct of the HND-PA corporation, there would be joint and several liability. See, Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978). There was no error of law.

K. Setoff Against Jury Award (Motion Nos. 2 & 41)

The HND-PA parties argue it was error for the jury to find that $142,454 awarded by the court in the Haymond and Lundy litigation and, the $262,325 awarded by the court as Haymond's portion of the Clark fee, were not credits against the $1,050,000 allowed HND-CT by the June 29, 2000 Agreement. They argue the court should have instructed the jury the amounts were to be credited against the $1,050,000, and under Fed. R. Civ. P. 59(e), the court must amend the judgment and deduct $404,779, the total of the two credits.

The June 29, 2000 Agreement conveyed from HND-CT to HND-PA, "all property including but not limited to...cases in progress owned by HND-CT." Pl. Exh. 5 at ¶1. Excluded from this conveyance/assignment were "funds totaling $1,050,000 which may be received in connection with a lawsuit against Marvin Lundy.

Id. Because the language "received in connection with a lawsuit against Marvin Lundy" was ambiguous, the court submitted the issue to the jury. Chuy v. Philadelphia Eagles Football Club, 595 F. 2d 1265 (3d Cir. 1979). The only question is whether the jury's finding that the $142,454 and $262,325 were not credits against the sum of $1,050,000 was clearly erroneous.

The question presented to the jury was whether the $142,454 and $262,325 were credits against the $1,050,000 designated in the June 29, 2000 Agreement. The $142,454 judgment was entered for Haymond as part of the Final Judgment distributing the assets of H&L in Civil Action No. 99-5048. Haymond v. Lundy, No. 99-5048 (E.D. Pa. Aug. 23, 2002)(Final Judgment Order). There, the court adopted the Receiver's distribution recommendations, in calculating the amounts due Hochberg, Lundy, and Haymond under the court's judgment (the fees due from H&L cases minus the amount owed the partnership). Haymond v. Lundy, 2002 U.S. Dist. LEXIS 15770, at *8-*9. (E.D. Pa. Aug. 23, 2002). Although Haymond's distribution was $1,675,402, the court subtracted $1,532,948 in accounts receivable diverted from escrow by HND-PA. This resulted in the $142,454 judgment for Haymond. Id., at *24.

The $262,325 judgment was a referral fee distributed by the court in Civil Action No. 99-5048. Haymond v. Lundy, No. 99-5048 (E.D. Pa. Oct. 8, 2002)(Order distributing the Clark referral fee). On October 20, 1998, Napoli, as an employee of H&L,

commenced the action, London Clark, a minor, et al. v. Chow, et al. (CCP Phila. Court, October Term 1998, No. 2033). According to the lists of client files submitted to the court, after H&L dissolved, HND did not have a signed retainer or contingency agreement with Sonya Clark, the mother of the minor child named in the action. Id. As of April 13, 2000, Ms. Clark stated that she no longer wanted to be represented by Lundy or Napoli, and the file was transferred to Robert Ross of Kline & Specter. Id. The Clark action settled for $1,743,211, and Ross subsequently sent Lundy and Napoli letters advising them a referral fee of $581,070.33 would be held in escrow pending an order of the court regarding distribution. Id. The court's Final Judgment/ Distribution on August 23, 2002, directed the Receiver to disburse any remaining partnership capital to the partners in accordance with their percentage interests in the partnership: 50% to Haymond and 50% to Lundy. Id. As a result, the court distributed 50% of the fee to Haymond, and 50% to Lundy, i.e., $262,325 to each party.

Before addressing the question of credits against the judgment, the jury found the HND-PA parties material breached the June 29, 2000 Agreement, and that breach excused future non-performance of the Agreement by Haymond. RESTATEMENT OF CONTRACTS, 2D §237 (1981). As a result of the material breach, the jury was entitled to find Haymond was no longer bound by the $1,050,000

recovery limit set by the June 29, 2000 Agreement. There was substantial evidence that Haymond's actual loss from the wrongful diversion of the escrow fees was at least $1,532,948 (the amount which Haymond was charged as though he had received and retained in the Civil Action No. 99-5048 final judgment). Because the $1,050,000 recovery limit was no longer applicable, the jury was entitled to find that the $142,454 judgment for Haymond and the $262,325 distribution of the Clark referral fee were not credits against the $1,050,000. Even if the $142,454 and $262,325 were applied against the $1,675,402 judgment to which Haymond would have been entitled in the Lundy action had the H&L fees not been diverted from escrow, the total recovery for Haymond is $1,454,779, which is $78,169 less than he was entitled under the accounting in the Kellner report.

The jury's findings that the $142,454 and $262,325 were not credits against $1,050,000 in favor of Haymond was consistent with its finding that the HND-PA parties materially breached the June 29, 2000 Agreement so that it was not binding on Haymond. This finding was not inconsistent with the evidence and so was not erroneous.

L. Summary Judgment Motions (Motion Nos. 7 & 37)

The HND-PA parties argue the court erred in denying their Motions for Summary Judgment for the reasons stated in the rest of the post-trial motions. As the lengthy discussion above

attests, it is clear there were genuine issues of material fact that precluded summary judgment. There was no error of law.

M. Motions for Judgment as a Matter of Law or New Trial (Motion Nos. 3, 4, 5 & 6)

This was a complicated trial with multiple parties and multiple issues. The jury listened attentively. The verdict on the interrogatories, reviewed carefully with all counsel, was consistent with the evidence. If there were any error of law, it was harmless because the findings in favor of the Haymond Parties were supported by overwhelming evidence. The objections, singly or together, do not justify setting aside the jury verdict.

IV. Conclusion

For the reasons stated above, all of the HND-PA parties' post-trial motions are denied. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAYMOND, NAPOLI DIAMOND, P.C.,	:	
ANDREW NAPOLI, SCOTT	:	**CIVIL ACTION**
DIAMOND, JACK BERNSTEIN,	:	
DAVID BERMAN	:	
	:	
v.	:	
	:	
JOHN HAYMOND	:	
and	:	
THE HAYMOND LAW FIRM, P.C.	:	**No. 02-721**

ORDER

AND NOW, this 8th of September, 2004, the court having been advised that there were certain clerical errors in its Memorandum and Order of August 27, 2004, in accordance with Fed.R.Civ.P. 60 it is **ORDERED** that:

1. The Memorandum and Order is **REVISED** as follows:

(a) Page 6 Lines 20-22 reads as follows: Haymond and Lundy were both obligated to place in escrow net fees already earned and those received from future Haymond and Lundy cases. Id. at 390.[4]

(b) Page 9, lines 3-5 reads as follows: Bernstein. Haymond also suggested that the Haymond law firm would cover all expenses, salaries and employee benefits and that Scott Diamond would be paid a $150,000 salary plus benefits. Id.

(c) Page 11, lines 11-12 reads as follows: Id. Haymond did not know until January 30, 2002 that HND-PA ceased escrowing fees.

(d) The references to HND-PA found on page 12, lines 6, 8, and 25 have been changed to HND-CT.

(e) The citation to "Paper 197 (Order granting partial summary judgment" found on page 16, line 16 has been changed to "Paper 197 (Order denying partial

[4] (The text of this footnote has not been reprinted in this order.)

summary judgment)" and moved to lines 21- 22.

(f) The citation found on page 16, line 19 has been omitted.

(f) Page 21, lines 2-12 reads as follows: #181) (Order setting trial schedule). In the first phase, the jury, on consideration of liability for breach of contract and related counterclaims, found defendants had signed the Joint Litigation and Common Interest Agreement with Lundy without consulting with or obtaining consent from at least three of the five persons listed in paragraph 9 of the June 29, 2000 Agreement. The jury also found this conduct was not a breach of their June 29, 2000 agreement because the HND-PA parties had materially breached that Agreement first by failing to retain fees from H&L cases in escrow and disregarding Haymond's shareholder rights. The jury found that the June 29, 2000 Agreement

(g) Page 46, line 1 reads as follows: 1 (Paper #220) that the Haymond parties did not materially breach.

(h) Page 46, lines 6-11 reads as follows: With regard to the jury's finding the Haymond parties had not materially breached the June 29, 2000 Agreement, the HND-PA parties argue that it was stipulated that the Haymond parties did

not perform according to the terms of the Agreement by settling with Lundy, so it was prejudicial error to include that question to the jury. However, as the jury was instructed, breach of

(i) Page 46, lines 14-17 reads as follows: Even though the parties had stipulated to non-performance, the jury was entitled to find whether any non-performance was material. The jury found that *prior* to the settlement between

2. In all other respects, the Memorandum and Order of August 27, 2004, remains unchanged.

3. A copy of the revised Memorandum and Order is attached hereto and shall be filed with this Order

_____

Norma L. Shapiro, S.J.